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No. 89-1901

Supreme Court, U.S.
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In The Supreme Court Of The United States

OCTOBER TERM, 1989

PRINCE EDWARD SCHOOL FOUNDATION,

Petitioner,

v.

HERMITAGE METHODIST HOMES OF VIRGINIA, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI

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BRIEF IN OPPOSITION
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I.
PRELIMINARY STATEMENT

In a unanimous decision applying state property law principles the Supreme Court of Virginia has held that the income of a charitable trust devolves to the ultimate beneficiary, The Hermitage Home, regardless of whether the special limitations imposed on the initial gifts to educational institutions were deemed unconstitutional. (A-21).[1] If the

[1] Petitioner, Prince Edward School Foundation, will be referred to throughout as "Prince Edward". Respondent, Hermitage

limitations are assumed to be unconstitutional, they cannot be given legal effect. However, under Virginia future interests principles, the Court cannot merely strike the offensive language without changing the essential nature and quality of the putative gifts and, accordingly, must strike the gifts in their entirety. (A-31).

Methodist Homes of Virginia, Inc., will be referred to throughout as "The Hermitage Home".

The Hermitage Home is a Virginia non-profit corporation and has no parent or subsidiary company.

Hermitage Methodist Homes of Virginia, Inc. v. Dominion Trust Company, 239 Va. 46, 387 S.E.2d 740 (1990), of which Prince Edward seeks review, is contained in an Appendix to the Petition at A-1 through A-35; the Codicil to Jack Adams' last will and testament is contained in that Appendix at F-27 through F-38 and reference is made herein to those portions of the Appendix, indicated by the letter "A" or "F", as appropriate, and followed by the appropriate page numbers.

If, however, the limitations are deemed constitutional, then, inasmuch as each successive ostensible educational beneficiary has violated those limitations, the gift to each such beneficiary terminates by natural operation. (A-32 & -33). In either event, by effect of Virginia property law, the trust income flows to the ultimate beneficiary, The Hermitage Home. (A-32).

II.
QUESTIONS PRESENTED

A. Should the Court undertake to review the decision of the Supreme Court of Virginia that a gift to an educational institution fails regardless of whether the restrictive limitations imposed on that gift are unconstitutional since, under Virginia property law principles, if the limitations are unconstitutional the entire gift is void, if the limitations

are constitutional the gift terminates by natural operation and, in either event, the gift devolves to the ultimate beneficiary?

B. Should the clear intent of a privately administered, charitable, testamentary trust, a product of the testator's own social philosophy and personal desires, be thwarted merely because the testator imposed a racial qualification regarding some, but not all, of the putative beneficiaries, all of whom are likewise private?

III.
STATEMENT OF THE CASE

The Hermitage Home accepts the Statement of the Case submitted in the Petition for Writ of Certiorari (the "Petition") with the exception of the following:

A. Prince Edward states that, "[A]t

common law in Virginia all gifts to trustees for educational or charitable purposes were void and would fail unless validated by an act of the legislature." (Petition at 9).

Because it was not necessary for the Virginia Court to reach the constitutional issue, it also never decided whether the charitable trust was valid even without a validating statute, an argument advanced by The Hermitage Home below.

B. Prince Edward states that the Virginia Court "gave effect to the discriminatory provisions..." (Petition at 17) and that, because of the nature of the gift, upon its violation of the restrictive provisions, its right to receive income would cease and, accordingly, the gift to the educational

beneficiary was not valid. (Petition at 18).

The Virginia Court did not hold that Prince Edward's admission of black students made the gift invalid. On the contrary, the Virginia Court agreed arguendo that the discriminatory provisions were unconstitutional and void (A-21) and then, recognizing that it could not merely excise the offending language without changing the nature of the gift, fairly applied its normal principles of construction to determine the ultimate disposition of the trust. (A-31).

IV.
ARGUMENT

A. There is no Federal Question for the Court to Review

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state

courts that rest on adequate and independent state grounds". Herb v. Pitcairn, 324 U.S. 117, 125 (1945). State courts are the ultimate expositors of state law. Mullaney v. Wilbur, 421 U.S. 684, 691 (1975). The Court will not consider the correctness of a decision on non-federal grounds unless it is an obvious subterfuge to evade consideration of a federal issue. Radio Station WOW v. Johnson, 326 U.S. 120, 129 (1945).

The Court has recently reexamined its treatment of this jurisdictional issue. In Michigan v. Long, 463 U.S. 1032 (1983), Justice O'Connor wrote:

> If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.
> ...We believe that such an approach will provide state judges with a clearer opportunity to develop state

> jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law.

Id., 463 U.S. at 1041.

The Virginia Court states clearly and expressly that its unanimous decision is based on principles of real property law (A-21) and would be the same regardless of the resolution of any perceived federal constitutional questions. (A-32). It reached its conclusions "without deciding" whether the trust provisions were unconstitutional and void. Instead, the court assumed, arguendo, that the limitations were violative of the constitution and then disposed of the case on state future interests principles. (A-21).

> [W]here the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support

the judgment.

Id., 463 U.S. at 1038, n.4 (quoting Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935)). The Virginia Court's decision indicates clearly and expressly that it is based on adequate and independent state real property law grounds (A-21) and, accordingly, this Court should not undertake to review it. Michigan v. Long, 463 U.S. at 1041.

B. The Trust Provisions are not Violative of the Constitution

The Fourteenth Amendment provides, in pertinent part, that "[n]o state shall deny to any person...the equal protection of the laws." U.S. Const. Amend XIV, Section 1. Since this Court's decision in the Civil Rights Cases, 109 U.S. 3 (1883), "the principle has become firmly embedded in our Constitutional law that the action inhibited by the first section of the

Fourteenth Amendment is only such action as may fairly be said to be that of the States.... That Amendment erects no shield against merely private conduct, however discriminatory or wrongful." Blum v. Yaretsky, 457 U.S. 991, 1002-03 (1982) (citing Shelley v. Kraemer, 334 U.S. 1, 13 (1948). See also Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

In Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982), the Court held that, in order for his conduct to constitute a violation of the Equal Protection Clause of the Fourteenth Amendment, a party charged with depriving another of a federal right must be a person who may fairly be said to be a "state actor". Id., 457 at 937. "Without a limit such as this, private parties could face

constitutional litigation whenever they seek to rely on some state rule governing their interactions with the community surrounding them." Id.

Petitioner maintains that the racially discriminatory provisions of the Adams Trust were the product of "unconstitutional state action" in that their inclusion was compelled by Virginia statute. (Petition at 25-26). The "state compulsion test" was analyzed in Adickes v. S. H. Kress & Co., 398 U.S. at 169-70. First, plaintiff "must show a deprivation of a right guaranteed to [plaintiff] by the Equal Protection Clause of the Fourteenth Amendment". Id. Second, plaintiff must show that the decision "to discriminate on the basis of race [was made] under the compulsion of state law." Id.

Regarding the first issue, the provisions of Adams' charitable bequest do not constitute a deprivation of any rights guaranteed to Prince Edward by the Fourteenth Amendment. "Surely it cannot be said that any particular individual had a judicially recognizable 'right' to the testator's charity, or an enforceable claim arising from the testator's 'failure' to make a charitable gift to him." Lockwood v. Killian, 375 A.2d 998, 1003 (Conn. 1977)(testator's restriction of trust beneficiaries to members of own religious faith upheld).

> The interest in preserving an area of untrammeled choice for private philanthropy is very great.... Indeed, I find it something of a misnomer to apply the pejorative term "racial discrimination" to a failure to make a charitable gift.

Jackson v. Statter Foundation, 496 F.2d 623, 639-40 (2d Cir. 1974) (Friendly, J.,

dissenting).

Second, Adams' testamentary decisions were not made under "compulsion of state law". Adickes v. S. H. Kress & Co., 398 U.S. at 170. There, the Court held that a violation of the Equal Protection Clause of the Fourteenth Amendment would be made out if plaintiff showed (1) the existence of a state-enforced custom of segregating the races in public eating places and (2) the refusal to serve plaintiff was motivated by that state-enforced custom. Id., 398 U.S. at 173-74.

Here, it is claimed that the Adams Trust would be invalid but for Section 55-26 of the Code of Virginia (Repl. Vol. 1974)[2] and that this statute, in turn,

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[2] This statute was repealed in 1975. 1975 Va. Acts ch. 547. In the next year, the substance of the statute was re-enacted without any discriminatory provisions as current Section 55-26.1 of the Code of Virginia. 1976 Va. Acts ch.

compelled Adams to discriminate on the basis of race. The argument is that the language of the statute validated a gift for the education of either white students or black students but not both and that it, ipso facto, gave impetus to a violation of the Fourteenth Amendment. (Petition at 25-27).

This argument fails, however, for three reasons: First, the statute, by its very language, did not mandate any action on the part of Adams. See Va. Code Section 55-26 (1974 Repl. Vol.). The state did not require Adams to make a charitable gift "but has merely announced the circumstances under which its courts will [consider such a trust valid]." See

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546. Thus, any negligible national concern in the operation of state future interests property laws is further attenuated by a real issue of mootness.

Flagg Brothers, Inc. v. Brooks, 436 U.S. 149, 166 (1978). Adams was free to dispose of his money in almost any fashion he desired, before or after death, by trust or otherwise. He was also free not to give his money away. His creation of the Adams Trust was purely a voluntary, charitable act without compulsion from any body or any thing.

Second, once Adams decided to make a gift to charity, he was not restricted by any Virginia law in the selection of a scheme or vehicle through which to effectuate the gift. Indeed, Virginia has always recognized the validity of direct gifts, without a trust medium, to charitable corporations for purposes within their charters without resort to a validating statute. Fitzgerald v. Doggett's Ex'r., 155 Va. 112, 155 S.E. 129

(1930). Further, he was free to select the legal estate granted to each charitable beneficiary (defeasible or determinable fee).

Third, even after he elected to make a charitable gift and decided to do so by means of a testamentary trust, he nevertheless was not compelled to discriminate by the existence of such statute because his decisions were self-motivated. Indeed, there is no evidence he even knew of the existence of the statute. See Adickes v. S. H. Kress & Co., 398 U.S. at 170.

Cases involving state enforcement of criminal trespass statutes through the arrest and prosecution of citizens on the basis of race are inapposite. See e.g., Robinson v. Florida, 378 U.S. 153 (1964); Lombard v. Louisiana, 373 U.S. 267 (1963);

Peterson v. City of Greenville, 373 U.S. 244 (1963). The case of Sweet Briar Institute v. Button, 387 U.S. 423, on remand, 280 F. Supp. 312 (W.D. Va. 1967), is similarly inapplicable. There the District Court refused to allow a local Commonwealth's Attorney and the Attorney General of Virginia to force the Institute to continue to restrict admission to "white girls and young women." Id., 280 F. Supp. at 312-13. Here, however, the Court is neither being asked to uphold criminal convictions nor to force Prince Edward to continue to deny admission to students on the basis of race but, rather, to "effectuate as nearly as possible the explicit terms of [Adams'] will." See Evans v. Abney, 396 U.S. at 444. The police power of the state is in no way being activated.

The Court in Adickes considered Peterson and its progeny in reaching its decision. Adickes, 398 U.S. at 170. Nevertheless, it held that in order to make out a violation of the Fourteenth Amendment petitioner must show that the private actor was motivated by the state-enforced custom of racial segregation in public eating places. Id., 398 U.S. at 174. That burden lies with the party claiming a constitutional violation. The Court said "[w]hatever else may also be necessary to show that a person has acted 'under color of [a] statute' for purposes of Section 1983,...we think it essential that he act with knowledge of and pursuant to that statute". Id., 398 U.S. at 162, n.23. (emphasis added).[3]

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[3] While both Lugar and Adickes addressed claims under 42 U.S.C. Section 1983 rather than directly under the Fourteenth Amendment, the Court has

Thus, even assuming the Virginia statute compelled unconstitutional racial discrimination, unless Adams executed his will knowing of that statute and was motivated by it no state action was involved. Adickes v. S. H. Kress & Co., 398 U.S. at 170. Because the limitations on the gifts reflected Adams' own racial attitudes, judicial noninterference with the natural operation of these limitations would not violate the Fourteenth Amendment. Adickes v. S. H. Kress & Co.,

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explicitly stated that the requirements were identical. "In cases under [Section] 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment." Lugar v. Edmondson Oil Co., 457 U.S. at 928 (quoting United States v. Price, 383 U.S. 787, 794 n.7 (1966)). Indeed, the "under-color-of-state-law" requirement may be more stringent than the "state-action" requirement of the Fourteenth Amendment. See Lugar v. Edmondson Oil Co., 457 U.S. at 935, n.18.

398 U.S. at 174.

The decisions in Evans v. Newton, 382 U.S. 296 (1966), and Evans v. Abney, 396 U.S. 435 (1970), fortify this conclusion. In Evans v. Newton, the Court held that because a park devised to a municipality in trust was a public facility it could not continue to be operated on a racially discriminatory basis. 382 U.S. at 302. In view of that decision, the Supreme Court of Georgia, on remand, ruled that the testator's intent to provide a segregated park had become impossible to fulfill and the trust therefore failed. See Evans v. Abney, 396 U.S. at 436.

In their appeal of the Georgia Court's decision, petitioners asserted that, since Georgia's statutes explicitly authorized the inclusion of racial restrictions in a devise of property for

the establishment and preservation of parks, the racial restrictions in the testator's will constituted state action. Id., 396 U.S. at 440. This Court rejected this assertion, however, stating that there was no "indication that [the testator] in drawing up his will was persuaded or induced to include racial restrictions by the fact that such restrictions were permitted by the Georgia trust statutes.... On the contrary, the language of [the testator's] will shows that the racial restrictions were solely the product of the testator's own full-blown social philosophy." Id., 396 U.S. at 445. This Court refused to frustrate the testator's intentions on so thin a reed of unconstitutional discrimination even to the extent of allowing a public park to be closed. Id.

Similarly, the Commonwealth of Virginia is not at all the motivating force in the purely private decision of Adams to include the limitations in his gift. Adams established the trust to benefit private institutions, subject to certain racial limitations. The compelling inference is that these limitations were the product of his own social philosophy. Certainly Prince Edward has not shown otherwise. Moreover, the language in the codicil goes well beyond that which allegedly is mandated by Section 55-26. It reflects an attitude greatly exceeding mere pro forma conformity with a questionable statutory dictate. If Adams merely was attempting to ensure that his gift was valid in accordance with the statute, he need only have made the gift "for the education of

white persons." Indeed, the will and codicil state unequivocally:

> It is my will that the creation...of the right to receive income as hereinabove set forth, shall be determinable upon...the admission of a student not of the White Race; and upon the happening of such an event, all rights of the said Institutions, successively, to receive income from the trust herein established shall automatically terminate. Any further payment of income by my Trustee to any of such Institutions after it has admitted a student not of the White Race shall be unauthorized and a violation of its duties as Trustee. (F-34 & -35).

It is inferable, if not inescapable, from the language used that Adams needed no legislative stimulus. Accordingly, his decision to discriminate, being self-motivated, was not a violation of the Fourteenth Amendment. Adickes v. S. H. Kress & Co., 398 U.S. at 170; Evans v. Abney, 396 U.S. at 445.

Petitioner asserts that the Virginia Court has given force to the discriminatory provisions (Petition at 29) and that, notwithstanding that its decision is "based on principles of real property law" (A-21); it cannot withstand this Court's scrutiny in light of Shelley v. Kraemer, 334 U.S. 1 (1948). However, this Court's distinction of Shelley from the facts in Evans v. Abney, 396 U.S. 435 (1970), is equally appropriate in the instant case. Here, the effect of the Virginia Court's decision is to eliminate all discrimination in the educational trust by eliminating the educational trust, a loss shared by white and black students equally in the same manner as the closing of the public park in Georgia. See Evans v. Abney, 396 U.S. at 445. Indeed, the Virginia Court agreed arguendo that the objectionable

provisions were unconstitutional and void (A-21) and then fairly applied its normal principles of construction. The court itself stated:

> [T]he interests of the educational charities fail completely. And, this is not because we give effect to an invalid trust provision. Rather, we strike the entire gift to Prince Edward and the gifts to the other educational beneficiaries because the offending language cannot be stricken from the provision without changing the essential nature and quality of the estate.

(A-31 (citing Evans v. Abney, 396 U.S. at 444-45)). "[T]he Constitution imposes no requirement upon the [Virginia] courts to approach [Adams'] will any differently than they would approach any will creating any charitable trust of any kind." Id., 396 U.S. at 446.

C. The Trust Provisions are not Violative of any Federal Statute or "National Public Policy"

Contrary to petitioner's implication, 42 U.S.C. Section 1981 has no application to the Adams Trust. As the Court has recently held:

> By its plain terms, the relevant provision...protects two rights: "the same right...to make...contracts" and "the same right...to enforce contracts." ... The first of these protections extends only to the formation of a contract, but not to the problems that may arise later.... The right to enforce contracts does not, however, extend beyond conduct by an employer which impairs an employee's ability to enforce through legal process his or her established contract rights.

Patterson v. McLean Credit Union, 109 S. Ct. 2363, 2372-73 (1989). Jack Adams made no contracts with and denied the enforcement of no contracts to any Virginia private school or any aspiring Virginia private school student.

Further, if, as Prince Edward now ironically urges, there is a national

public policy mandating that private institutions must be racially integrated to be socially or constitutionally acceptable, it suffers no harm as a result of allowing the Virginia Court's decision to stand. The effect of that decision is not to enforce a will provision founding a segregated school or compelling racial discrimination at existing facilities. Adams had the power to force nothing. Each of the educational institutions named in the will is racially integrated and undoubtedly will remain so. Certainly Adams anticipated that possibility when he executed his will and codicil. This Court, in not interfering with that decision, will not be affecting the altruistic change of heart had eventually and without deliberate speed by Prince

Edward for reasons satisfactory to itself[4] but will be enhancing care for the elderly of all races while at the same time remaining faithful to its standards of review, the property laws of Virginia and Adams' charitable intent.

V.
CONCLUSION

The Supreme Court of Virginia's decision was based on independent and adequate state grounds and, accordingly, this Court should not undertake to review that decision.

To the extent this Court deems it appropriate to consider the arguments raised in the Petition, The Hermitage Home respectfully asserts that there is no unconstitutional deprivation of protected

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[4] Including, undoubtedly, the hope, at least, that it could do so and yet somehow continue to receive Adams' largesse.

interests. Jack Adams voluntarily established a private, charitable trust to benefit certain private institutions. His terms were clear and unequivocal.

The racially restrictive provisions of the trust were not compelled by the Commonwealth of Virginia but, rather, were the product of Adams' palpable social philosophy. Moreover, none of the potential beneficiaries has a constitutional right to receive Adams' charity, especially when it would be literally against his will and over his dead body.

There is no violation of the Fourteenth Amendment when a state court, applying its normal principles of construction to determine a testator's intent in establishing a charitable trust, allows his explicit instructions regarding

the disposition of his private property to be effectuated. Neither a plea for further governmental intrusion into private matters nor sound constitutional doctrine requires otherwise.

Accordingly, The Hermitage Home respectfully requests that the Petition be denied.

Respectfully submitted,

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FILING AND MAILING CERTIFICATE

I, Barbara E. Grove, hereby certify that on this 29th day of June, 1990, I filed with the Clerk's Office of the United States the foregoing Brief in Opposition to Petition for a Writ of Certiorari and further certify that I mailed this same date the required copies to the opposing counsel listed below:

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